
**APPEALS BOARD
UTAH LABOR COMMISSION**

ROMAN DIAZ-CABRERA,

Petitioner,

vs.

**SWIFT & COMPANY and ZURICH
AMERICAN INSURANCE CO.,**

Respondents.

**ORDER SETTING ASIDE
DECISION OF ALJ**

ORDER OF REMAND

Case No. 03-1248

Roman Diaz-Cabrera asks the Appeals Board of the Utah Labor Commission to review Administrative Law Judge Marlowe's denial of Mr. Diaz-Cabrera's claim for benefits under the Utah Occupational Disease Act ("the Act"; Title 34A, Chapter 3, Utah Code Annotated).

The Appeals Board exercises jurisdiction over this motion for review pursuant to Utah Code Annotated § 63-46b-12, § 34A-3-102(2) and § 34A-2-801(3).

BACKGROUND AND ISSUE PRESENTED

Mr. Diaz-Cabrera claims occupational disease benefits from Swift & Company and its insurance carrier, Zurich American Insurance Co. (referred to jointly hereafter as "Swift"), for carpal tunnel syndrome allegedly caused by Mr. Diaz-Cabrera's employment at Swift.

After an evidentiary hearing, Judge Marlowe denied Mr. Diaz-Cabrera's claim on the grounds he had failed to comply with the 180-day notice requirement of § 34A-3-108 of the Act. In his motion for review, Mr. Diaz-Cabrera contends he did satisfy § 108's notice requirement.

FINDINGS OF FACT

Beginning in 1997, Mr. Diaz-Cabrera worked in E.A. Miller's meat-packing operations. At some point, Swift acquired the business from E.A. Miller. Mr. Diaz-Cabrera continued to perform the same work as before, but as Swift's employee.

Mr. Diaz-Cabrera's work involved strenuous and repetitive use of his hands and arms. In April 2001, he experienced numbness in his fingers and a sore left shoulder. He was diagnosed with arthritis, tendonitis and carpal tunnel syndrome. In January 2003, Mr. Diaz-Cabrera was diagnosed with right arm carpal tunnel syndrome and his physician prescribed wrist splints. Mr. Diaz-Cabrera suspected that his medical problems were related to his work duties. However, his physicians neither advised him that such a causal connection existed nor filed the Commission's Form 123—"Physician's Initial Report Of Injury Or Occupational Disease." Mr. Diaz-Cabrera continued to

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report for work and perform his regular duties. From time to time he asked for reassignment to different work, but declined Swift's offers to place him in lower-paying positions.

In September 2003, Mr. Diaz-Cabrera was again diagnosed with carpal tunnel syndrome. On October 10, 2003, his physician prepared a note stating that Mr. Diaz-Cabrera's carpal tunnel syndrome was fairly severe and probably work-related. Mr. Diaz-Cabrera delivered this note to Swift. In response, Swift transferred Mr. Diaz-Cabrera to other work. Three days later, Swift fired Mr. Diaz-Cabrera for alleged insubordination. Mr. Diaz-Cabrera underwent carpal tunnel release surgery during February 2004.

DISCUSSION AND CONCLUSIONS OF LAW

Section 34A-3-104(1) of the Utah Occupational Disease Act provides that "[e]very employer is liable for the payment of disability and medical benefits to every employee who becomes disabled . . . by reason of an occupational disease under the terms of this chapter." However, § 34A-3-108 of the Act bars payment of such benefits to any employee who fails to provide timely notice of his or her occupational disease. Judge Marlowe's decision does not address the substance of Mr. Diaz-Cabrera's claim, but dismisses the claim for failure to satisfy § 108's notice provisions.

Section 108 provides, in material part, as follows:

- (2) (a) Any employee who fails to notify the employee's employer or the [Industrial Accidents] division within 180 days after the cause of action arises is barred from any claim of benefits arising from the occupational disease.
- (b) The cause of action is considered to arise on the date the employee first suffered disability from the occupational disease and knew, or in the exercise of reasonable diligence should have known, that the occupational disease was caused by employment.
- (3) The following constitute notification of an occupational disease:
 - (a) an employer's or physician's injury report filed with the: (i) division; (ii) employer; or (iii) insurance carrier

In summary, an employee has 180 days after his or her cause of action arises to notify the employer, the insurance carrier, or the Industrial Accidents Division. A cause of action does not "arise" until two events have both transpired: 1) The employee has suffered disability from the occupational disease; and 2) the employee knew or should have reasonably known that his or her employment caused the disease. For the reasons discussed below, the Appeals Board finds that the second of these two conditions is dispositive in this case.

Mr. Diaz-Cabrera sought medical care for his arms in April 2001 and January 2003. On both of these occasions, his physicians diagnosed carpal tunnel syndrome. If these physicians believed Mr. Diaz-Cabrera's carpal tunnel syndrome was work-related, they were obligated¹ to formally

1 Section 34A-3-109(8)(a) of the Act provides that . . . "all physicians, surgeons, and other health

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report their opinions on Form 123—Physician's Initial Report Of Injury Or Occupational Disease — and then provide copies of Form 123 to Mr. Diaz-Cabrera, the Industrial Accidents Division and the employer's insurance carrier. The fact that Mr. Diaz-Cabrera's physicians did **not** file Form 123 is a persuasive indication that they had not yet related Mr. Diaz-Cabrera's carpal tunnel syndrome to his work. And if these medical experts did not make such a causal connection, the Appeals Board cannot conclude that Mr. Diaz-Cabrera "knew" or "should have known" of the causal connection.

The record establishes that Mr. Diaz-Cabrera did not reasonably know that his carpal tunnel syndrome was work-related until September or October 2003. He provided notice of this occupational disease to his employer in mid-October 2003, well within §108's 180-day notice period. Consequently, his claim is not barred by §108 and should be adjudicated on its merits.

ORDER

The Appeals Board sets aside Judge Marlowe's decision of July 11, 2005, and remands this matter to Judge Marlowe for further proceedings consistent with this decision. It is so ordered.

Dated this 18th day of October, 2006.

Colleen S. Colton, Chair

Patricia S. Drawe

Joseph E. Hatch

providers attending occupationally diseased employees shall . . . make reports to the division at any and all times as required as to the condition and treatment of an occupationally diseased employee” The Labor Commission’s Rule 612-2-3.A requires that: “[w]ithin one week following the initial examination of an industrial patient, nurse practitioners, physicians and chiropractors shall file "Form 123 - Physicians' Initial Report" with the carrier/self-insured employer, employee, and the division.”